

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UMG RECORDINGS, INC., *et al.*, §
Plaintiffs, §
vs. § Civil Action No. 1:17-cv-00365-DAE
GRANDE COMMUNICATIONS §
NETWORKS LLC, §
Defendant. §

GRANDE'S PROPOSED INSTRUCTION REGARDING
ELIGIBILITY FOR STATUTORY DAMAGES UNDER 17 U.S.C. § 412

Pursuant to the Court's direction by email on October 30, 2022, Grande hereby offers its identification of evidence regarding eligibility under 17 U.S.C. § 412. Plaintiffs have the burden to show that each asserted work is eligible. *See, e.g., Didio v. Jones*, No. CV13-4949 PSG, 2017 WL 11636167, at *1 (C.D. Cal. Apr. 17, 2017) ("Plaintiffs therefore carry the burden of demonstrating that they complied with § 412's requirements.").¹ To show publication and registration dates, Plaintiffs rely on registration certificates and corresponding "summaries." *See* PX20-24. To show earliest alleged infringement dates, Plaintiffs rely on PX-459. This evidence fails to demonstrate eligibility of each work. For example:

- For three Bruno Mars songs asserted by Warner, PX-459 (rows 78-80) shows a first infringement date of 2/14/2013, and PX-23 (at 1) shows a registration date of 2/19/2013.
- For Sony's asserted song "The Pretender," PX-459 (at row 36) shows first infringement on 5/8/2012, and PX-21 (at 1) shows registration on 4/4/2014.
- For Sony's asserted song "The Beginning...", PX-21 (at 5) shows a registration date of 10/1/2013, and PX-459 (at row 156) shows first infringement on 9/25/2013.
- For three Katy Perry songs asserted by UMG, Plaintiffs identify infringement dates that precede **publication** dates.²
- For several asserted works, Plaintiffs' exhibits identify multiple registration dates, and eligibility depends on which registration date the jury applies.³

The record also contains evidence sufficient for a juror to reject Plaintiffs' proffered first infringement dates, including evidence that Rightscorp notice dates do not reflect actual uploading or downloading (*see, e.g.*, PX-5); evidence of download dates that differ from first infringement dates (*see id.*); and testimony that Rightscorp ignored choke data (*See, e.g.*, 10/27/2022 Trial Tr. at 147).

¹ *See also, e.g., Ushodaya Enterprises, Ltd. v. V.R.S. Int'l, Inc.*, 64 F. Supp. 2d 352, 353 (S.D.N.Y. 1999) ("Plaintiff bears the burden of demonstrating that it complies with the prerequisite of section 412."); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 361, 364 (D. Mass. 1993), aff'd and remanded, 36 F.3d 1147 (1st Cir. 1994) ("Thus, [plaintiff] carries the burden of demonstrating that it complied with § 412's prerequisite.").

² Compare PX-459 row 215 ("Dark Horse," first infringement 10/1/2013) and rows 293-294 ("By the Grace of God" and "Choose Your Battles," first infringement 10/20/2013) with PX-19 at p. 2 (publication date of 10/22/2013).

³ *See, e.g.*, PX-19 at 12 (Mariah Carey); PX-459 at rows 588-591 (first infringement 5/5/2014).

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By: /s/ Richard L. Brophy

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